No. 4857

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a corporation,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

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GENERAL INDEX

Page

Argument 7, 34

Conclusion 33, 34

Employment of Freeborough 9, 10

Freeborough Not Under Oregon Workmen's Compensation Act 15, 25

Interpretation of Terms of Policy to Favor Assured 22, 25

Opinions of Lower Court 23, 24, 28, 33

Points and Authorities 4, 7

Salary of Freeborough Not a Basis of Premium. 25, 33

Statement of Case 1, 4

Use of Electric Building 10, 15

INDEX TO CASES

Page

American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977, 18 Supt. Ct. Rep. 552) 6, 23

Cochran v. Standard Accident Insurance Co. of Detroit, (Mo.) 271 S. W. 1011 ..... 7, 25

Darrow v. Family Fund Society, 116 N. Y. 537 (22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 ..... 6, 23

Evanhoff State Industrial Accident Company, 78 Oregon 503 ..... 6, 17, 18

Hoffman v. Aetna Ins. Co., 32 N. Y. 413 (88 Am. Dec. 337) 6, 23

Huschbros v. Maryland Casualty Co., 276 S. W. 1083 7

Moore v. Aetna Life Insurance Co., 75 Oregon 47, 53 ..... 6, 23

Olson's Oregon Code, Sec. 6616 ..... 6, 19

Olson's Oregon Code, Sec. 6620 6

Olson's Oregon Code, Sec. 6621 6

Sneck v. Travelers' Ins. Co., 88 Hun. 94 (34 N. Y. Supp. 545) 6, 23

State Ex. Rel. Marshall v. Roesch, 108 Oregon 371 ..... 6, 20, 21

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STATEMENT OF CASE

This is an action instituted by the Portland Electric Power Company, a corporation, defendant in error, to recover from the Employers' Liability Assurance Corporation Limited of London, England, a corporation, plaintiff in error, under an insurance policy covering

accidental injury to persons upon the elevators of the Electric Building in Portland, Oregon.

The defendant in error is engaged in the business of generating and distributing light and power to many communities in Oregon and Washington, including the City of Portland, and also operates interurban railway lines in Oregon and the street railway system in the City of Portland. The said Electric building is owned by the defendant in error, and is the headquarters for its activities; as appears from the evidence, sixty (60) per cent. of the traffic upon the elevators of said building is the carriage of the employees of the defendant in error. The Electric building has nine floors and eight floors of the building are occupied by offices of the defendant in error. Field employees of the defendant in error report to the main offices of the Company in the Electric building and for that reason the employees' traffic upon the elevators is very heavy.

On October 4th, 1923, James A. Freeborough was injured while riding upon a freight elevator which is specifically described in Item 3 of the Declarations of the policy of insurance.

The said Freeborough filed his claim for damages arising out of his injuries against the defendant in error and the defendant in error referred the claimant, under the terms of said policy, to the plaintiff in error. The plaintiff in error denied liability under said policy

and on February 17, 1924, the said Freeborough filed suit against the defendant in error in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries; on February 19, 1924, said complaint, together with summons, was duly served upon the defendant in error and immediately thereafter, and upon the same day, the defendant in error delivered said complaint and summons to the plaintiff in error and requested it to defend said suit in accordance with the terms and provisions of said policy of insurance; thereafter, on February 23, 1924, the plaintiff in error returned said complaint and summons to the defendant in error and denied any liability under said policy and refused to assist in the defense of said suit.

Thereafter, on June ..., 1924, a judgment in the sum of Eight Thousand ($8,000) Dollars was duly entered in the last mentioned suit, in favor of the said Freeborough and against the defendant in error; the plaintiff in error refused to satisfy said judgment to the extent of Seven Thousand Five Hundred ($7,500) Dollars, the limit of its policy, and refused to reimburse the defendant in error for its expenses incurred in the imperative surgical and medical relief of the said Freeborough at the time of the accident.

On July 10, 1924, the defendant in error paid said judgment and on July 15, 1925, filed in the District Court of the United States for the District of Oregon,

this suit to recover Eight Thousand ($8,000) Dollars under the terms of said policy of insurance.

Thereafter issue was joined, trial was had, and on March first, 1926, judgment was entered in favor of the defendant in error and against the plaintiff in error, in the sum of Seven Thousand Nine Hundred Nineteen Dollars and Seventy Five Cents ($7,919.72), plus costs and disbursements.

From the judgment last mentioned the plaintiff in error brings this appeal.

There is no question but what the locus of the accident is covered by the policy, nor is there any question raised as to the amount of the judgment.

The plaintiff in error contends that the policy did not cover injuries to James A. Freeborough for the reasons: First, that he was an employee of the defendant in error under the Workmen's Compensation Act of Oregon, and second, that he was not an employee of the defendant in error engaged in the maintenance, upkeep and care of the Electric building and his wages were not included in the rate base of said policy.

POINTS AND AUTHORITIES

1. MATERIAL EXCERPTS FROM POLICY:

"Coverage. This Policy covers, except as provided in Agreement V, bodily injuries, including

death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition." Agreement IV.

"Exclusions. This Policy shall not cover injuries or death, * * * (6) to any employee of the Assured under any Workmen's Compensation Act or Law." Agreement V.

"Basis of Premium. The premium for this Policy is as expressed in Item 3 of the Declarations except as this Policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration (by which term is meant all salaries, wages, earnings for overtime, piece work or contract work, bonuses or allowances, also the cash equivalent of all merchandise, store certificates, credits, board or any other substitute for cash) earned during the Policy period by all persons employed by the Assured in the said business opera-

tions as expressed in Item 3 of the Declarations." Condition A.

2. If the employer accepts the Workmen's Compensation Act of Oregon then his employees are under the Act, but if the employer rejects the said Act, then his employees are not under the Act.

Sections 6616, Oregon Laws.

Section 6620, Oregon Laws.

Section 6621, Oregon Laws.

Evanhoff State Industrial Accident Commission, 78 Oregon 503.

State Ex. Rel. Marshall v. Roesch, 108 Oregon 371.

3. "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured: Hoffman v. Aetna Ins. Co., 32 N. Y. 413 (88 Am. Dec. 337); Darrow v. Family Fund Society, 116 N. Y. 537 (22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495); American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977, 18 Sup. Ct. Rep. 552); Sneck v. Travelers' Ins. Co., 88 Hun. 94 (34 N. Y. Supp. 545).

Moore v. Aetna Life Insurance Co. 75 Oregon 47, 53.

Cochran v. Standard Accident Insurance Co. of

Detroit (Mo.), 271 S. W. 1011.
Huschbros v. Maryland Casualty Co. (Ky.), 276 S. W. 1083.

ARGUMENT

In the following argument we will discuss the two contentions of the plaintiff in error:

First, that the said James A. Freeborough as an employee of the defendant in error, which had rejected the Workmen's Compensation Act of Oregon, was nevertheless under the Workmen's Compensation Act of Oregon and was excluded from protection under sub-paragraph (6) of Agreement V of the policy, and

Second, that the said James A. Freeborough was not an employee covered by the terms of the policy because he was not engaged in the maintenance, care and upkeep of the Electric building and his wages were not calculated in the rate base of the policy.

I.

As to the Workmen's Compensation Act of Oregon. Agreement IV of the policy provides:

> "Coverage. This Policy covers, except as provided in Agreement V, bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or

the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition."

It is noted that this is the paragraph of the policy designated as the "coverage paragraph". Under this paragraph we look to find what injuries are covered and protected under the terms of the policy. The above paragraph specifically provides that "except as provided in agreement V" the policy covers bodily injuries accidentally sustained *"by any person"* while upon the premises described in the declarations. There is no dispute but what the elevator in the electric building was described in the declarations and hence, unless the said Freeborough was excluded by the terms of agreement V, the accident was expressly covered by the terms of agreement IV. In agreement V, which is designated as the paragraph of "exclusions" and in which, under the express terms of agreement IV, we must find the only exceptions to the coverage of all accidents upon the elevator in question.

The plaintif in error insists that the following clause of agreement V excludes the said Freeborough from protection under the terms of the policy, to-wit:

"This policy shall not cover injuries or death * * * (6) to any employee of the Assured under any Workmen's Compensation Act or Law."

The precise question then comes, was the said Freeborough under the Workmen's Compensation Act of Oregon, within the intent of the parties to the policy and under a fair construction of the terms of the policy?

The plaintiff in error brings this appeal upon the proposition that the said Freeborough was under the Workmen's Compensation Act of Oregon and, therefore, excluded from protection under the policy. The defendant in error contends, and the lower court found, that the said Freeborough, within the intent of the parties to the policy and under a fair interpretation of the terms of the policy, was not under the Workmen's Compensation Act of Oregon and was, therefore, not excluded from coverage under the policy.

EMPLOYMENT OF FREEBOROUGH

The said Freeborough was an electrical machinist and was not employed by the defendant in error at the electric building, but was employed in a shop of the defendant in error across the Willamette River from the said electric building and in another part of the City of Portland. In the basement of the said electric building is an electric substation where is located considerable electric equipment necessary to the conduct of the said

substation, but having nothing to do with the maintenance, care or upkeep of the electric building.

At the time of the accident the said Freeborough was ordered to go from his shop across the River in Portland to the electric building to make some repairs in the electrical equipment in the substation. The said Freeborough found it necessary in making such repairs to take some part of the equipment back to his shop, and he was so removing said equipment, upon the elevator in said electric building, for the purpose of making the necessary repairs thereon, when the accident occurred.

The hazard of the use of the elevator by Freeborough was exactly the same hazard as would have resulted from the use of said elevator by the employee of any contractor to whom the Portland Electric Power Company might have let the contract to repair the equipment in the substation. If John Jones, as the employee of John Smith, suffered the same accident, then there would be no possible question but what his injuries would have been covered by the terms of the policy.

USE OF ELECTRIC BUILDING

The said electric building is a nine story building and, excepting for the substation in the basement and sub-basement, and except for the seventh floor, is occupied by the defendant in error as a headquarters office

building from whence its activities in Oregon and Washington, in the generation and distribution of light and power and in the operation of interurban and city railways, are directed.

The Portland Electric Power Company has about four thousand employees and less than two hundred and fifty of such employees have offices in the electric building, but all of such employees at some time or other, have to do business with the general offices in the electric building. As a result the traffic on the elevators in said building is very largely the carriage of employees. The evidence shows that such carriage of employees is sixty (60) per cent. of the traffic.

If the said Freeborough was not protected under the terms of the policy, then an accident to a conductor on street cars who might come to the building to make his report, would not be protected; nor would accidents upon the elevators of said building to the employees of the Company who live at Salem and Hillsboro, Oregon, or Vancouver, Washington, be covered.

In the interpretation of the terms of the insurance policy the intention of the parties should be ascertained and the policy construed accordingly.

There can be no question but what it was the intention of the defendant in error, in entering into this insurance contract, to cover all the traffic upon its ele-

vators. It would have been most unwise for the defendant in error to have insured only forty (40) per cent. of the traffic upon its elevators and left sixty (60) per cent. of such traffic without protection. Especially would this be true when we consider that the Employers' Liability Act in Oregon has withdrawn the damage limit of Seven Thousand Five Hundred ($7,500) Dollars in case of death of an employee resulting from his employment.

On the other hand there is no reason why the plaintiff in error should have sought to exclude from the protection of the policy the employees' traffic on the elevators; the hazard of such traffic was not increased by reason of the employment, except in the case of engineers, janitors and window washers, who were engaged in the care and upkeep of the building, and such additional hazard was specifically covered by providing an additional premium of five cents per One Hundred Dollars of premium.

The premium of this policy was not based upon a forty per cent. use of said elevators but was based upon a one hundred per cent. use; sixty per cent. of such use was the carriage of employees.

The intent of the plaintiff in error not to exclude all employees of the defendant in error is plainly shown by the fact that the employees "engaged in the maintenance, care and upkeep of the building" are specifically included at an additional premium.

If agreement V excludes all employees of the defendant in error, then those "engaged in the maintenance, care and upkeep of the building" are also expressly excluded, for the janitors and window washers of the building are engaged in hazardous occupations and are as much under the Workmen's Compensation Act of Oregon as was the said Freeborough.

If protection, on account of the injuries to Freeborough, was excluded, then protection to those engaged in the care and upkeep of the building was likewise excluded.

The plaintiff in error is inconsistent in contending that some employees of the defendant in error were under the Workmen's Compensation Act of Oregon and that other employees were not under said Act. All employees of the defendant in error were affected in the same way and to the same extent by the rejection on the part of the defendant in error of the Workmen's Compensation Act, and after such rejection the plaintiff in error cannot urge that John Jones, a janitor and window washer of the said electric building, was under the protection of the policy and that the said Freeborough, as an electrical mechanist of the defendant in error engaged in the repair of equipment in the substation of said building, was not under the protection of said policy.

The reason of mentioning "those engaged in the maintenance, care and upkeep of the building" and including an additional premium for such employees, was by reason of the additional risk and hazard which such employees encountered in the care and upkeep of the building, in excess of the risk and hazard encountered by other employees and members of the public. The employees engaged in the maintenance, care and upkeep of the building, are on the roof, the window ledges, and are operating the elevators inexpertly during nights and holidays when the regular operators are not in charge of elevators. As a result of such additional hazard on the part of such employees, an additional premium was charged for protection against such risk and hazard.

Reading the policy in the light of the circumstances of the parties, the protection desired, and the consideration received therefor by the plaintiff in error, there can be no question but what it was the intent of both parties to cover fully the operation of the elevators in said building.

It is the duty of this court to construe this policy so as to effectuate the intent of the parties at the time of entering into the same, rather than to give the plaintiff in error the opportunity, under a highly technical construction of the contract, to renege and escape the logical and contemplated effect of its insurance wager.

WAS FREEBOROUGH "UNDER" THE OREGON WORKMEN'S COMPENSATION ACT?

The plaintiff in error is before this court demanding that, contrary to the intention of the parties, the policy of insurance be construed so that the said Freeborough will be found to be "under" the Oregon Workmen's Compensation Act, and, therefore, excluded from protection under the policy by the terms of agreement V.

It is admitted that the defendant in error rejected the Workmen's Compensation Act of Oregon and hence, the sole question is one of interpretation by this court of said exclusion clause of agreement V of the policy, to determine whether Freeborough, after the rejection of the Workmen's Compensation Act by his employer, was, within the meaning of said exclusion clause, under the Oregon Workmen's Compensation Act.

The advancement of this argument is most surprising to the defendant in error for the plaintiff in error, and all other Insurance Companies in Oregon, have, since the passage of the said Act, pleaded for casualty insurnace of employees in the hopes of regaining the casualty business which was lost by the Insurance Companies upon the passage of the act. If this interpretation of the policy were correct, then the plaintiff in

error would be free of liability from an accident to any employee engaged in a hazardous occupation in any State where a Workmen's Compensation Act was in effect, regardless of whether the employer had rejected or accepted the terms of such Act.

The purpose of excluding employees who are under the Employers' Liability Act is to avoid double protection to the employee and thereby stimulate fraud and malingering with consequent increase of accident cost.

It is true, as contended by the plaintiff in error, that all employees engaged in hazardous occupations are, since the passage of the Oregon Workmen's Compensation Act, subject to more favorable conditions of recovery of damages for personal injuries in suits against employers, by reason of the deprivation of the employer of certain defenses; but, by the terms of the Act itself, these benefits accrue only to those employees who are *not* under the Act; these benefits do not accrue to employees who *are* under the Act.

The Act itself segregates employees into two classes, —(1) those under the Act, and (2) those not under the Act, and the Act says to employees, in effect: "If you are *under the Act* then you will receive compensation and you must also contribute to the Industrial Accident Fund, but if your employer will *not* come under the Act so that you will be under the Act and entitled to compensation, then your employer will be

penalized for not coming under the Act by limiting his defenses in any suit which you may bring against him for personal injuries growing out of your employment."

Even if an employer accepts the Act so as to come under the Act, still the employee may, by proper notice, withdraw from the protection and obligations of the Act and upon such notice of withdrawal, the employee would certainly not be under the Act.

The taking away of the defenses of an employer by the terms of the Act was a leverage to force employers *under the Act;* and if they did not accept the Act. they were not *under the Act,* nor subject to its protection; the employer, or employee, is either under the Act, or not under the Act, dependant upon the acceptance or rejection of the Act by the employer, or upon the rejection of the Act by the employee after acceptance by the employer; as stated by Judge McBride in Evanhoff vs. State Industrial Accident Commission, 78 Ore. 503:

> "As before noted the Act leaves the employer free to accept the provisions of the Act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the act has swept away certain defenses heretofore available; but, as this could have been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of

the provisions of the Act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory acts are here inapplicable. The State says to the employer and employee alike:

'We present to you an plan of accident insurance which you may accept or reject at your own pleasure. If you accept, you must be bound by its terms and limitations; if you reject it, the courts are open to you with every constitutional remedy intact. Take your choice between our plan and such remedies as the statute gives you.' "

Again in the same case,—(Page 519):

"The State proposes to employers and employees an accident and life insurance scheme, and offers it to them in lieu of litigation. It does not compel them to become participants in it or to contribute to it, but if they voluntarily choose to do so, they waive any other remedy, because the statute provides as a part of the scheme that they must do so; and, as before observed, by permission of the statute a party may waive or limit the quantum of his compensation for any possible prospective injury. The non-compulsory feature of the act may be said to eliminate most of the objections urged upon constitutional grounds."

From the foregoing interpretation of the Act, by Chief Justice McBride, it appears that there is no question in his mind as to when an employer or employee is under the Act or outside of the Act; from his interpretation of the language of the Act, its purposes and intent, —one is led irresistibly to the conclusion that if an employer accepts the Act then his employees are under the Act, but if the employer rejects the Act, then his employees are not under the Act.

This interpretation is also confirmed by the language of Section XI of the original act in the Oregon Law—6616, which provides:

> "All workmen in the employ of persons, firms or corporations, who as employers, are subject to to this Act, shall also be subject thereto; provided, however, that any such workman may be relieved of the obligations thereby imposed and shall lose the benefits thereby conferred, by giving to his employer written notice of an election not to be subject thereto, in the manner hereinafter specified."

From the last quoted section we must conclude that an employee who himself rejects the Act, or whose employer has rejected the Act, is not "subject to" or under the terms of the Act.

In the instant case the defendant in error rejected the terms of the Act, and Freeborough, as its employee,

was, by reason of such rejection on the part of the defendant in error, not "subject to" or under the Act.

Counsel for plaintiff in error has cited several cases holding that the phrase "Under the Act" should be interpreted as "subject to the Act". We have no controversy with the plaintiff in error as to such a definition.

In Section 6620 and in Section 6621 of Oregon Laws and numerous other sections of the Workmen's Compensation Act, the language of the Act unequivocably shows that it was the intention of the legislature to provide that an employee was subject to the Act only in case his employer accepted the Act without rejection by the employee, but if the employer rejected the Act, then there is no provision under which the employee may become subject to the Act, and he, upon rejection of his employer, is excluded from the protection of the Act.

The Supreme Court of Oregon, in various cases dealing with the terms of the Workmen's Compensation Act, has made very clear in every case, that the fact as to whether or not an employer was under the terms of the Act, depended upon his acceptance or rejection of the terms of the Act.

We quote from Justice Rand, in the case of State Ex. Rel. Marshall v. Roesch, 108 Ore. 371:

> "The employer, if he then desires to come under the operaion of the act, is permitted to file with the

commission a notice in writing, giving ten days' notice of his election to contribute under the act * * * "

The same Court in the same case, quoted the following, with approval, from a Michigan Court: (Page 373)

"It (the Act) does not compel an employer to accept its terms for any of his business activities, unless he chooses to do so. He is free to come under the law or to stay out. This being so, why may he not accept its terms as to one business and not as to another? Inasmuch as the election lies with him whether he will come under the law, I can see no good reason why he should not be permitted to accept its terms for one distinct business and not for another."

Again, in the same case (page 374), the Court says:

"In the instant case the defendant, when he took over the construction of the garage, filed with the commission the written notice required from one who elects not to come within the provisions of the act. By so doing he excluded himself from the operaion of the act so far as it applied to the construction of the garage."

Applying the foregoing language to the instant case, we find that the defendant in error by rejecting the Act,

"excluded itself from the operation of the Act" and thereby the employee was excluded from the operation of the Act, for there is no way by which an employee may come under the Act unless his employer is first under the Act.

Thus, from the terms of the Act, and from the interpretation of such terms by the Supreme Court of Oregon, we find that there can be no misunderstanding of ordinary language bearing on the question, as to when an employee is under or without the terms of the Workmen's Compensation Act; if the employer has rejected the Act, as in the instant case, then neither the employer nor the employee is subject to or under the terms of the Act.

But if there is any question in the mind of the court as to the proper interpretation of the policy, then under all rules of interpretation of insurance policies, the policy must be interpreted most strongly against the insurer who prepared the insurance contract.

We do not admit that there is any ambiguity in this contract but on the contrary it is the contention of the defendant in error that the intent of the parties to include, under the terms of the policy, the said accident to Freeborough is too plain for argument.

However, if there is any doubt in the mind of this court as to the proper interpretation of said subpara-

graph (6) of agreement V of said policy, then this court is bound to construe the same against the interpretation demanded by the Insurance Company under that rule of law which is well stated by Justice McBride in the case of Moore v. Aetna Life Insurance Co., 75 Ore. 47, 53:

> "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured: Hoffman v. Aetna Ins. Co., 32 N. Y. 413 (88 Am. Dec. 337); Darrow v. Family Fund Society, 116 N. Y. 537 (22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495); American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977, 18 Sup. Ct. Rep. 552); Sneck v. Travelers' Ins. Co., 88 Hun. 94 (34 N. Y. Supp. 545.)

That the policy is "reasonably susceptible" of the interpretation claimed by the defendant in error is evident by the fact that Judge Wolverton in overruling the demurrer of the plaintiff in error, filed his opinion as follows:

> "This case is here for the second time for interpretation of the policy upon which the action is based. It is now insisted by defendant, in support of its demurrer to plaintiff's reply, that, because of the following clause found in the policy, namely,

'This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law,' it does not cover under the conditions present.

It is admitted that the Workmen's Compensation Act was rejected by plaintiff, and the reply declares that the employee Freeborough did not elect to come under its provisions.

The acts, as I read it, so far as applicable, places employers primarily under its provisions, but they may escape its operation by rejecting the same in manner prescribed. The employees are not primarily within its purview; nor does it affect them unless they elect to avail themselves of its provisions. When the employer rejects the act and the employee does not elect to avail himself of its provisions, neither is henceforth under the Act. So that the clause relied upon for relief from liability on the part of the defendant does not operate here as an exception to liability under the policy. The demurrer to the reply will therefore be overruled."

Transcript of Record, 43-44.

We do not believe that even the plaintiff in error would contend that Judge Wolverton is an unreasonable interpreter of the law, and we feel that the plaintiff in error will admit that any interpretation made by

Judge Wolverton of the terms of said policy is an interpretation which is "reasonably susceptible."

The court in the case of Cochran v. Standard Accident Insurance Company of Detroit (Mo.), 271 S. W. 1011, has laid down this rule:

> "When an insurance contract is so drawn as to be 'fairly susceptible' of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured."

That Judge Wolverton is a reasonably intelligent man and that he honestly construed the terms of said policy will certainly be admitted. If such an admission is made, then under the aforequoted rule of law we must adopt that interpretation of the policy "which is most favorable to the insured."

II.

SALARY OF FREEBOROUGH NOT A BASIS OF PREMIUM

As a secondary technical defense the plaintiff in error insists that the said Freeborough was not protected under the terms of said policy because he was admittedly an employee of the defendant in error and his

salary was not included as a basis for the fixing of the premium.

By the express terms of agreement IV the policy covers

> "bodily injuries * * * accidentally sustained by any person or persons while within or upon the premises described in the Declarations or elsewhere by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of said premises and their maintenance in good condition."

We should note that this policy covers the occupation, use and maintenance of the premises by the assured. Certainly it was intended that the assured should occupy and use the premises by and through its employees, agents and representatives. How can the assured occupy and use the electric building except through its officers, agents and representatives?

Under Agreement IV every person, except as provided in Agreement V, is protected under the policy. No exception is made in Agreement V to employees whose salary is not the basis of a premium; therefore, the plaintiff in error is without foundation upon which

to base its contention. However, the plaintiff in error would look to another paragraph of the policy which purports to be the "Basis of Premium." This paragraph reads as follows:

> "The premium for this policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

The foregoing quoted paragraph applies to "all persons employed by the assured in the said business operations as expressed in Item 3 of the Declarations." The only persons employed by the Assured as expressed in Item 3 of the Declarations are "those engaged in the maintenance, care and upkeep of the building". The wages of those persons who are engaged in the maintenance, care and upkeep of the building should be computed as a basis of premium. But even the failure to include the salary or wages of all such persons who might be engaged in the maintenance, care and upkeep of the building, in the basis of a premium would not make ineffective the insurance in case of accidents to such employees whose salaries were omitted from the

said basis of premium, but, at the end of the policy period, the premium should be subject to adjustment by the inclusion as a basis of premium of any omitted salaries or wages.

The said Freeborough was not an employee engaged in the maintenance, care or upkeep of the electric building and for that reason the language of Condition A of said policy is wholly inapplicable, for the language of such condition covers only "persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Again we must raise the inference under the application of the law hereinbefore quoted, that the interpretation of the policy in this particular regard is reasonably susceptible of the construction as claimed by the defendant in error, for in sustaining the demurrer to the answer the lower court adopted the interpretation claimed by the defendant in error in the following opinion:

> "This is an action, on liability insurance, for injuries sustained by an employee of plaintiff in the building and premises described and mentioned in the policy. The covering clause of the policy is as follows:
>
> "Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, in-

cluding death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assuerd as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition."

The injury sustained was not on account of any of the excepted causes enumerated in Agreement V.

It is further provided that, "The foregoing Agreements are subject to the following conditions"; among which is Condition "A", which recites, so far as essential here:

"The premium for this Policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Further provision is made by the same condition for adjusting the premium earned at the expiration of the policy period, and for payment or repayment, as the case may be, according as the earned premium may be greater or less than the advance premium paid.

Item 3 describes the premises as "Electric Building at N. E. corner of Broadway and Alder Streets, including sidewalk surrounding same." Such also is the building in which the elevators, three in number, are situated. Item 3 contains, under the caption "Estimated Remuneration of Employees," the numerals 6000, and on the margin under the caption "Premium," the language, "Those engaged in the maintenance, care and upkeep of the building at .05 per hundred."

The injured party, although in the employ of plaintiff, was engaged as an electrician in its repair-shop, operated at a place distant about one mile from the building and premises described in the policy.

The contention of the defendant corporation, which is presented by its answer to the complaint and plaintiff's demurrer thereto, is that the injured party was not one of the persons covered by the policy; it being argued that only such employees of

the plaintiff as were engaged in the maintenance, care and upkeep of the building described in Item 3 were so covered. This depends entirely upon the proper interpretation of the provisions of the policy. There is no ambiguity which needs elucidation extrinsically as an aid to interpretation. The covering clause particularizes bodily injuries, etc., "sustained by any person or persons while within or upon the premises described in the Declarations." The language is most comprehensive—"any person or persons." That the injured party was within the premises described in the declarations when hurt is not questioned.

Condition A is intended wholly as a regulation for adjusting the premium to be paid for the issuance of the policy.

It is not doubted that the policy covers members of the general public, regardless of any employment by plaintiff. The premium for this is as expressed in Item 3. But the premium for coverage upon plaintiff's employees is based upon a different estimate, namely, the remuneration earned by all employees of plaintiff during the policy period, engaged in the business operations as expressed in such Item 3, that is to say, the maintenance, care and upkeep of the building designated, at .05 per hundred. While not all of plaintiff's

employees were engaged in the maintenance, care and upkeep of the building, Condition A does not avail to vary or modify the engagement of Agreement IV, which specifies a coverage of bodily injuries sustained by any person or persons while within or upon the premises. This plainly and obviously covers, not only the general public, but employees of plaintiff as well, whether engaged at the time in the maintenance, care and upkeep of the building or not. It is reasonable to assume that the parties considered that .05 per hundred of the entire remuneration for the policy period, of those employees so engaged was adequate as a premium for coverage upon all of plaintiff's employees, including those not so engaged. But, however that may be, Condition A treats of a different subject from that treated by Agreement V, the one relating to an adjustment of premium and the other to the persons or subjects covered by the policy of insurance. I find no ground for inference that, because the basis stipulated for ascertaining the premium which was to govern as to plaintiff's employees did not include all such employees, it was intended that none of such employees were to be embraced by the covering clause except those engaged in the maintenance, care and upkeep of the building designated. The clauses themselves are separate and distinct, and treat of separate and distinct subjects, and must be so considered. Thus

considered, the party injured, though an employee of plaintiff not engaged in the maintenance, care and upkeep of the building, was embraced by the covering clause of the policy."

Transcript of Record, 17-21.

Every reasonable interpretation of the policy must be so resolved in favor of the defendant in error; a consideration of the foregoing opinion of Judge Wolverton shows that it is not only a reasonable interpretation of the terms of the policy but that it is the only interpretation which may be logically deduced.

CONCLUSION

We contend that there is no ambiguity in the terms of the policy and that, upon a strict construction of the same, the contentions of the plaintiff in error must be overruled.

However, if the court should disagree with us in this regard, nevertheless the court must find that the interpretation demanded by the defendant in error, and found by the lower court, is reasonably susceptible from the terms of the policy, and, therefore, should be upheld under the "settled rule in the construction of a policy of insurance that whenever a policy is reasonably susceptible of two interpretations, that meaning will be given to it which is most favorable to the insured."

Conscious of the merits of its cause and appreciating the struggle of the plaintiff in error to invoke a rule of technical interpretation which is not supported by the intent of the parties, the language of the contract, or the law of the case, the defendant in error confidently submits its cause to the determination of this Court.

Respectfully submitted,

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